SUPREME COURT, U. S.

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No. 594

In the

# Supreme Court of the United States

OCTOBER TERM

FAYE S. FERGUSON,
*Petitioner,*

*v.*

JAMES WALTER FOUNTAIN,
*Respondent.*

## PETITION FOR CERTIORARI

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No.....

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# Supreme Court of the United States

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FAYE S. FERGUSON,

*Petitioner,*

*vs.*

JAMES WALTER FOUNTAIN,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Faye S. Ferguson, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas in the above entitled cause on May 21, 1969, (Petitioner's Motion for Rehearing in said cause having been denied by the Supreme Court of Texas on June 18, 1969).

## I. REPORT OF THE OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Texas, printed in Appendix A hereto, infra, Page 15, is reported in 441 S.W.2d 506. The opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District in Amarillo, printed in Appendix B hereto, infra, Page 22, is reported in 437 S.W.2d 323.

## II. GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The final judgment of the Supreme Court of Texas was rendered and entered on May 21, 1969, Appendix A hereto, infra, Page 15.

2. The order denying petitioner's Motion for Rehearing by such Supreme Court was rendered and entered on June 18, 1969, Appendix C hereto, infra, Page 26.

3. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257.

## III. QUESTIONS PRESENTED

1. Whether Petitioner has been denied due process and equal protection of the laws, as guaranteed to her by the Fifth and Fourteenth Amendments to the Constitution of the United States, by the Texas Supreme Court's holding that Rule 327 of the Texas Rules of Civil Procedure required Petitioner to produce a statement of facts of evidence adduced on trial of the case, even though undisputed jury misconduct was shown by transcript of the Statement

of Facts on Motion to Set Aside Verdict, transcript of pleadings, charge of the Court, and jury verdict.

2. Whether Rule 327 of the Texas Rules of Civil Procedure, requiring the entire record for appellate review, including statement of facts adduced on trial of the case, is unconstitutional by denying Petitioner due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, when undisputed reversible error has been established by Petitioner without presenting statement of facts adduced on trial of the case.

## IV. CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provisions involved in this case are the Fifth and Fourteenth Amendments to the Constitution of the United States, reading as follows:

Fifth Amendment:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

Fourteenth Amendment:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## V. STATEMENT

### 1. MATERIAL FACTS:

Petitioner, Faye S. Ferguson, sustained personal injuries in an automobile collision when her stopped vehicle was struck from the rear by a vehicle being driven by respondent.

Petitioner instituted this suit in the 140th District Court of Lubbock County, Texas, to recover her damages arising from such personal injuries, alleging that such collision was caused by specific acts of negligence by respondent. Respondent contended that he was confronted with a sudden emergency by the sudden and unexpected failure of the brakes on the vehicle he was driving.

In answer to special issues the jury found that James Walter Fountain failed to keep a proper lookout, but that such failure was not a proximate cause of the collision (Tr. 15); that Fountain failed to turn his vehicle in time to avoid the collision, but that such failure was not negligence (Tr. 17); that Fountain was confronted by a sudden emergency on the occasion in question, and that upon being confronted by such emergency he did what an ordinary prudent person would have done under the same or similar circumstances (Tr. 19). Petitioner's damages were set by the jury at the total amount o $6,476.62 (Tr. 20, 21).

Petitioner filed her Motion to Set Aside Jury Verdict and Grant Mistrial, alleging specific acts of misconduct on the part of the jury, and attached to such motion the affidavits of two of the jurors (Tr. 24-29).

After hearing uncontroverted testimony of three jurors on such motion, the trial court overruled the motion and

entered judgment against Petitioner and in favor of Respondent (Tr. 21-33). Petitioner timely filed her Motion for New Trial, alleging jury misconduct (Tr. 35-41), which was overruled by the trial court. (Tr. 42).

The Court of Civil Appeals held that the undisputed acts of misconduct complained of by petitioner caused probable harm to her, and that the accumulative effect of the acts of misconduct called for a reversal and required that the verdict be set aside, and reversed and remanded the case.

Petitioner presented for appellate review the Statement of Facts on Motion To Set Aside Jury Verdict, and a transcript of the pleadings, charge of the Court, and jury verdict.

The Supreme Court of the State of Texas reversed the judgment of the Court of Civil Appeals and affirmed the trial court's decision, on the basis that under Rule 327 of the Texas Rules of Civil Procedure, petitioner was required to file a statement of facts of the entire trial of the case, and that in failing to do so she failed to prove that the misconduct of the jury rather than the state of evidence probably caused the jury to answer the Special Issue adversely to her.

## 2. HOW FEDERAL QUESTIONS WERE PRESENTED IN THE STATE COURTS:

The Constitutional and Federal questions forming the basis of this petition to this Honorable Court were urged upon the state courts as follows:

Petitioner first raised Federal questions in her Motion for Rehearing filed in the Supreme Court of Texas, by

bringing forward the following points of error in such Motion for Rehearing:

"VIII.

The Supreme Court has erred in reversing the judgment of the Court of Civil Appeals and affirming the judgment of the trial court because respondent established as a matter of law that injury probably resulted to her by jury misconduct. This was accomplished by submitting to the Honorable Supreme Court the Statement of Facts on Motion to Set Aside Jury Verdict, transcript of pleadings, charge of the Court, and verdict of the jury. The reversal of the Court of Civil Appeals and affirmance of the judgment of the trial court was error on the part of the Supreme Court of the State of Texas and constituted a denial to respondent of due process of law as guaranteed to her by the Fifth Amendment to the Constitution of the United States of America, which provides as follows:

> "No person shall be - - - deprived of life, liberty or PROPERTY, WITHOUT DUE PROCESS OF LAW: - - -"
> (caps and underscore ours)."

"XIV.

The Supreme Court has erred in reversing the judgment of the Court of Civil Appeals and affirming the judgment of the trial court because respondent established as a matter of law that injury probably resulted to her by jury misconduct. This was accomplished by submitting to the Honorable Supreme Court the Statement of Facts on Motion to Set Aside Jury Verdict, transcript of pleadings,

charge of the Court, and verdict of the jury. The reversal of the Court of Civil Appeals and affirmance of the judgment of the trial court was error on the part of the Supreme Court of the State of Texas and constituted a denial to respondent of due process of law and equal protection of the laws, as guaranteed to her by Section 1 of the Fourteenth Amendment to the Constition of the United States of America, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, WITHOUT DUE PROCESS OF LAW; nor deny to any person within its jurisdiction THE EQUAL PROTECTION of the laws."
> (caps and underscore ours)"

"XVI.

The Supreme Court has erred in holding that Rule 327 of the Texas Rules of Civil Procedure required respondent to produce a statement of facts of evidence adduced on trial of the case, even though undisputed jury misconduct was shown by transcript of the Statement of Facts on Motion to Set Aside Verdict, transcript of pleadings, charge of the Court, and jury verdict. The Supreme Court's holding that nevertheless Rule 327 was not sufficiently complied with constituted an arbitrary interpretation of Rule 327 of the Texas Rules of Civil Procedure and denied to respondent due process and equal protection of the laws

as guaranteed to her by the Fifth and Fourteenth Amendments to the Constitution of the United States of America and Subsection 19 of Article 1 of the Constitution of the State of Texas."

"XVII.

The Supreme Court has erred in holding that Rule 327 of the Texas Rules of Civil Procedure required respondent to produce a statement of facts of evidence adduced on trial of the case, in the face of respondent's having established undisputed jury misconduct and reversible error by the foreman of the jury disregarding the Court's instructions and stating to the jury at least twice, and probably more, that every man was innocent until proved guilty beyond a shadow of a doubt, and further stating to the jury that it was immaterial how Special Issue No. 1(b) was answered because respondent would get the money already awarded to her by the jury in the damage issues. The Supreme Court's holding, that nevertheless Rule 327 was not sufficiently complied with because respondent did not present a statement of facts adduced on trial of the case, is arbitrary, unreasonable and unconstitutional, and denies to respondent equal protection and due process of law as guaranteed to her by the Fifth and Fourteenth Amendments to the Constitution of the United States of America and Subsection 19 of Article 1 of the Constitution of the State of Texas."

"XVIII.

The Supreme Court has erred in reversing the Court of Civil Appeals and affirming the trial court judgment by

virtue of Rule 327 of the Texas Rules of Civil Procedure because the provisions of such Rule requiring the entire record, including statement of facts adduced on trial of the case, when undisputed reversible error has been established by respondent without presenting statement of facts adduced on trial of the case, renders such Rule 327 unconstitutional, unreasonable, arbitrary and void, and denies to respondent due process and equal protection of the laws as guaranteed to her by the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Subsection 19 of Article 1 of the Constitution of the State of Texas."

The Supreme Court of Texas refused and denied peitioner's Motion for Rehearing without written opinion.

## VI. REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The decision of the Texas Supreme Court has the effect of denying Petitioner the right of appellate review, guaranteed to her by the due process and equal protection provisions of the Fifth and Fourteenth Amendments to the Federal Constitution, for the sole reason of failure to include in the appellate record a statement of facts of evidence presented on trial, even though jury misconduct and the harmful effect thereof has been indisputably and conclusively shown by the record actually presented for review. Such holding therefore is unconstitutional because it constitutes denial of due process and equal protection of the laws.

2. The Texas Supreme Court's decision in this case has the effect of holding that the undisputed and conclusive

evidence of jury misconduct established by Petitioner by the transcript of Statement of Facts on hearing of Motion to Set Aside Jury Verdict, will not be considered by the Texas courts without Petitioner also being required to bring up the whole record. Under the due process and equal protection guarantees of the Fifth and Fourteenth Amendments, Petitioner is entitled to a JUDICIAL EXAMINATION of every issue that, according to established procedure, may affect the attainment of a legal trial. The jury's violations of the Court's charge and its undisputed acts of misconduct clearly affected the attainment of a legal trial, and the due process and equal protection provisions require that Petitioner be accorded judicial examination and appellate review of such jury misconduct. The record on appeal presented by Petitioner is sufficient for the appellate courts to make such judicial examination, without the necessity of the whole record of the evidence adduced on trial of the case, and the denial of such right of review constitutes denial of due process and equal protection of the laws.

3 The Texas Supreme Court by its holding herein, disregarded previous holdings of the courts of our state respecting the guarantees of due process and equal protection in the Fifth and Fourteenth Amendments to the Constitution of the United States.

Vogt vs. Bexar County, 23 S.W. 1044, held as early as 1893 that as applied to procedure, due process requires a fair and impartial trial before a competent tribunal.

The right to a hearing, as guaranteed by due process, requires a JUDICIAL EXAMINATION of every issue that, according to established procedure, may affect the attainment of a legal trial. This was held by another early

case, Freeman vs. Ortiz, 153 S.W. 304, in 1913. Established procedure in our case was contained in the Court's charge, which the jury disregarded.

Due process of law includes both procedural protection and substantive protection. City of New Braunfels vs. Waldschmit, 207 S.W. 303. Houston & Tex. Cent. Ry. Co. v. Dallas, 84 S.W. 648.

Of course the guarantee of due process does not unduly restrain the State in the exercise of legislative police powers, but even the great and powerful police powers of the State of Texas cannot be arbitrary, unreasonable, nor beyond the necessities of the case. Rule 327, and its interpretation by the Texas Supreme Court in this case, appears to petitioner to be unreasonable, arbitrary and beyond the necessities of the case. See Spann vs. City of Dallas, 235 S.W. 513; Houston & Tex. Cent. Ry. Co. vs. Dallas, 84 S.W. 648; American Federation of Labor vs. Mann, 188 S.W. 2d 276.

"Due process of law" entitles a litigant to appellate review. The right to appellate review is as valuable and fundamental as the right to be heard in the trial court. Corsicana Hotel Co. of Texas vs. Kell, 66 S.W. 2d 760; Burrage vs. Hunt Production Co., 114 S.W. 2d 1228. Rule 327, and the Texas Supreme Court's interpretation thereof, and its strict application to this case denies to petitioner this fundamental right of appellate review.

Under the due process clauses of both State and Federal Constitutions, a litigant is entitled to appellate review. Board of Firemen's Relief and Retirement Fund Trustees of Texarkana vs. Hamilton, 386 S.W. 2d 754.

The Texas legislature is restricted in its powers by the

Fifth and Fourteenth Amendments to the United States Constitution, and by Subsection 19 of Article 1 of the Texas Constitution. Mellinger vs. City of Houston, 3 S.W. 249. Since the legislature can not deny a litigant due process, neither can Rule 327, nor the Texas Supreme Court by an interpretation of it.

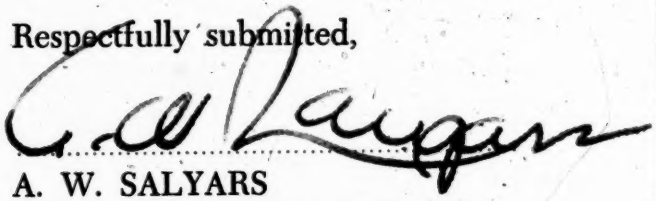
The "record as a whole" provision in Rule 327 was not contained in its source, Article 2234. It has not been tested as to its deprivation of due process. The harm is clearly demonstrated in this case. The cases are virtually unanimous that under Rule 327 the question of fact is whether or not misconduct occurred. Whether it had injurious effect is a question of law. The trial court's overruling of respondent's Motion to Set Aside Jury Verdict did not in this case have the effect of finding that no misconduct occurred because when misconduct is undisputed such presumption of no misconduct by the Court's ruling does not obtain. Rodman Supply Co. v. Jones, 370 S.W. 2d 951. The sole remaining question was whether or not the misconduct caused probable harm. The Court of Civil Appeals said yes, the Texas Supreme Court has in effect refused to pass on it, and affirmed the trial court, because of the "record as a whole" clause in Rule 327. This denies appellate review and therefore due process.

Petitioner was entitled to new trial by reason of the jury misconduct for the further reason that her trial was "materially unfair". The appellate courts strive to insure fair trials in trial court. Rule 327, and the Texas Supreme Court's interpretation thereof in this case, has the reverse effect and denies a fair trial. See In Re Northcutt's Estate, 340 S.W. 2d 510.

## CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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# APPENDIX A

## Opinion of the Court Below

IN THE SUPREME COURT OF TEXAS

No. B-1349

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JAMES WALTER FOUNTAIN, Petitioner,

v.

FAYE S. FERGUSON, Respondent.

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From Lubbock County,

Seventh District.

This appeal presents questions concerning jury misconduct. Faye S. Ferguson sued James Walter Fountain, a minor, and his father for personal injuries which she sustained when James Walter Fountain drove a vehicle into the rear of her vehicle. Fountain's defense was that he was confronted by an emergency when the brakes on his vehicle suddenly and unexpectedly failed. The trial court sustained a motion for instructed verdict for the defendant father, and rendered a judgment on a jury verdict that plaintiff take nothing as to James Walter Fountain. Plaintiff moved for a new trial grounded upon jury misconduct, but the trial court overruled her motion. She then appealed to the court of civil appeals without bringing forward a statement of facts. That court reversed the trial court judgment because of the jury misconduct about which plaintiff complained. 437 S.W.2d 323. We

reverse the judgment of the court of civil appeals because the plaintiff did not sustain her burden to prove material misconduct which, from the record as a whole, probably resulted in harm. Rule 327, T.R.C.P.

The answers to the special issues show the jury (1) found James Walter Fountain failed to keep a proper lookout, (2) refushed to find that the failure to keep a proper lookout was a proximate cause of the collision, (3) refused to find that Fountain was driving at an excessive rate of speed, (4) found Fountain failed to turn his vehicle to avoid the collision, (5) but such failure was not negligence, (6) refused to find that Fountain drove his vehicle too closely behind the vehicle in which plaintiff was riding, (7) found that, on the occasion in question, Fountain was confronted by a sudden emergency, (8) and he did what an ordinary prudent person would have done under the same or similar circumstances. The jury further found that plaintiff sustained damages in the sum of $6,476.62.

Plaintiff filed a motion for new trial in which she complained of jury misconduct. At the misconduct hearing, plaintiff presented three jurors who testified about three forms of jury misconduct. There was evidence that the foreman, on two occasions, said that every man was innocent until proved guilty beyond a shadow of a doubt, and that he also told other jurors that the answers to the first two issues, stated above, were immaterial in view of the answers to the damage issues. Another juror made the statement that she once had the experience of her brakes failing and that she could understand how it could have happened to Fountain.

The one complaining about jury misconduct has the burden to prove the overt act of misconduct, that it was

material misconduct, and "from the record as a whole that injury probably resulted." Rule 327, T.R.C.P.; Crawford v. Detering Co., 150 Tex. 140, 237 S.W.2d 615 (1951); White Cabs v. Moore, 146 Tex. 101, 203 S.W.2d 200 (1947). In oue opinion plaintiff did not discharge its burden to prove probable harm.

The trial court's order overruling the motion for new trial impliedly found that misconduct did not occur, since it contained no express finding of misconduct. Monkey Grip Rubber Co. v. Walton, 122 Tex. 185, 53 S.W.2d 770 (Com. App. 1932); St. Louis B. & M. R. Co. v. Cole, 14 S.W.2d 1024, reh. den. 16 S.W.2d 534 (Com. App. 1924). Plaintiff, however, says that findings of misconduct, whether express or implied, are not binding on the reviewing courts when all of the uncontroverted evidence is that the misconduct occurred. State v. Wair, 171 Tex. 69, 351 S.W.2d 878 (1961); Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462 (1943). The court of civil appeals sustained plaintiff's contention that the uncontradicted evidence showed the fact of misconduct. That court did not discuss the materiality of the misconduct or its probable harm, but concluded that harm resulted.

The point in time during jury deliberations at which misconduct occurs is an important factor in determining the probability of injury. Baird's Bread Co. v. Hearn, 157 Tex. 159, 300 S.W.2d 646 (1957); City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (19444). As stated by the court of civil appeals, and as revealed by the undisputed evidence taken during the misconduct hearing, the alleged misconduct occurred after the jurors had answered all but the first two issues. The jurors testified that they began answering the special issues, but passed over the first two concerning lookout and then answered

all of the rest of them in sequence. The jurors then returned to a consideration of the lookout issues after they answered issues exonerating Fountain on the other alleged acts of negligence and after finding he had acted in a sudden emergency as an ordinary prudent person whold have acted. When the jurors were reconsidering and again discussing the lookout issues, the alleged acts of misconduct occurred. The jurors then found that Fountain failed to keep a proper lookout, but refushed to find that his failure to keep a proper lookout was a proximate cause of the collision. Plaintiff says the misconduct probably caused the jurors to answer the proximate cause issue adversely to her. She says a favorable answer would have created a conflict between the lookout findings and the emergency findings.

It is not necessary for us to determine whether a conflict in findings would exist as plaintiff contends, since plaintiff failed to prove that misconduct of the jury probably caused the adverse answer to the proximate cause issue. The record which plaintiff has brought forward consists only of the transcript and the record of the testimony developed at the misconduct hearing. The statement of facts on the main trial is not before us. Rule 327 expressly fixes the burden upon the one complaining of misconduct to prove that "it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted . . ." Ross v. Texas Employers' Ins. Ass'n, 153 Tex. 276, 267 S.W.2d 541 (1954); Calvert, The Development of the Doctrine of Harmless Error in Texas, 31 Tex. L. Rev. 1 (1952).

The term "record as a whole" has been broadly construed to include "any and all parts of the record which may

throw light on the question of injury." Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462 (1943); Cole v. Waite, 151 Tex. 175, 246 S.W.2d 849 (1952); Akers v. Epperson, 141 Tex. 189, 171 S.W.2d 483, 156 A.L.R. 1028 (1943). The term includes matters disclosed by the evidence heard on the main trial as well as the motion for new trial. Motley v. Mielsch, 145 Tex. 557, 200 S.W.2d 622 (1947); Prudential Fire Ins. Co. v. United Gas Corporation, 145 Tex. 257, 199 S.W.2d 767 (1946). A consideration of the state of the evidence on the main trial has been sustained as a basis for treating jury misconduct as immaterial. Western Textile Products Co. of Texas v. Sidran, 153 Tex. 21, 262 S.W.2d 942 (1953). The effect of misconduct by one juror has been weighed against the evidence heard during the main trial in arriving at the conclusion that jury misconduct was harmless. Tudor v. Tudor, 311 S.W.2d 733, error ref. 158 Tex. 559, 314 S.W.2d 793.

The extent to which this court has gone in passing upon the law question of probable injury is even more fully illustrated by our comments about probable injury under Rules 434 and 503 in Aultman v. Dallas Railway & Terminal Co., 152 Tex. 509, 260 S.W. 596 (1953) and enlarged upon in Lumberman's Lloyds v. Loper, 153 Tex. 404, 269 S.W.2d 367 (1954). In the latter case we said:

> "* * * The 'whole record' clearly includes the statement of facts, and there is small point in looking to the latter, if we are to ignore the most essential thing which it discloses, to-wit, the state of the evidence. If the evidence is such that we believe that the jury would in all probability have rendered the same verdict that was rendered here, whatever the argument of the defendant's counsel or lack of it, how

can we logically say that the argument probably caused the rendition of an improper judgment based on that verdict? It is true that the rule in question cannot in every type of case be given the broad application which its words literally invoke. For example, in a case of an incorrect submission to the jury, we could hardly by-pass the error by making, in a sense, a decision on the weight of the evidence. Even in improper argument cases, we should doubtless consider the state of the evidence whith much caution. But, with some slight apology to consistency, we think tha tin argument cases we may; properly reason, as we do in this case, that since the evidence so preponderated in favor of the finding that the alleged accident did not occur, and since the worst of the offending argument had no direct reference to that specific mattter, the argument probably did not cause the verdict and judgment to be as they were."

In evaluating probable harm, this court has held that the preponderance of the evidence may be considered. Houseman v. De Cuir, 155 Tex. 127, 283 S.W.2d 732 (1955). When the state of the evidence from the record as a whole showed that the facts overwhelmingly favored the appellee, misconduct was held harmless. Walker v. Texas Employers' Ins. Ass'n, 155 Tex. 617, 291 S.W.2d 298 (1956). The rule was announced in City of Galveston v. Hill, 151 Tex. 139, 246 S.W.2d 860 (1952) that only such portions of a statement of facts as can have no bearing on harm, should be omitted by one who has the burden to establish harm. The complaint in that case was that the injection of insurance into a personal injury suit injured the plaintiff.

We conclude that the plaintiff in failing to bring forward the statement of facts failed to prove that the misconduct

of the jury rather than the state of evidence probably caused the jury to answer the special issue adversely to plaintiff. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

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Jack Pope
Associate Justice

Opinion delivered May 21, 1969

## APPENDIX B

### Opinion of the Court Below

COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT AMARILLO

No. 7886

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FAYE S. FERGUSON, Appellant

vs.

JAMES WALTER FOUNTAIN, ET AL, Appellees

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November 25, 1968

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This is a suit by Faye S. Ferguson against James Walter Fountain, a minor, and W. J. Fountain for personal injuries sustained as a result of an automobile collision. The trial court entered judgment for the defendants on the jury verdict. All of appellant's points of error relate to jury misconduct.

This suit involves alleged personal injuries sustained by the plaintiff in an automobile collision in the Cty of Lubbock when her stopped vehicle was struck from the rear by a vehicle being driven by James Walter Fountain and owned by W. J. Fountain. In response to the special issues submitted, the jury found: (1A) the defendant failed to keep a proper lookout; (1B) that such failure was not a proximate cause; (2A) the defendant was not driving at an excessive speed; (3A) the defendant failed to turn his

vehicle in time to avoid the collision; (3B) that such failure was not negligence; (4A) that the defendant was not following too closely behind plaintiff's vehicle; (5) that the defendant was confronted with a sudden emergency; (6) that the defendant did what an ordinary, prudent person whould have done under the same or similar circumstances; and awarded plaintiff $6,476.62 total damages.

Whether or not jury misconduct occurred is a question of fact, but whether or not injury probably resulted therefrom is a question of law to be determined by the appellate court. City of Houston vs. Quinoines 142 Tex 282; 177 S.W.2d 259. Texas Employers Insurance Association vs. Waldon (Tex. Civ. App.) 392 S.W.2d 509 (Ref. N.R.E.). Western Cottonoil Company vs. Arnold (Tex. Civ. App.) 279 S.W.2d 374.

A hearing on the plaintiff's motion to set aside the jury verdict and grant a new trial was held before the court. Three jurors testified at the hearing. While t he testimony of the three jurors was not identical in the manner in which they expressed themselves, they uniformally testified the first two special issues, relating to the defendant's lookout and proximate cause were not answered until the remaining issues, including damages, were answered. Upon returning to the consideration of these first two issues, all three jurors testified the foreman informed the jury, as one juror stated it: "That every man was innocent until proven guilty beyond a shadow of a doubt". All agreed the foreman made this statement at least two times and perhaps more. Each of the three jurors also stated the foreman informed them it was immaterial how they answered the negligence issues as the plaintiff would receive the amount of damages the jury had already assessed. This statement

was made on one occasion in response to a statement of Juror Kutch: "Why should we continue to waste time if we are going to find the defendant . . . there was no negligence on the part of the defendant. At which time I was assured by the foreman of the jury that this made no difference as to what damages would be awarded." After this statement by the foreman, the jury proceeded to answer the proximate cause issue in the negative.

We are of the opinion the statement by the jury foreman that it was immaterial how the negligence issues were answered as the plaintiff would recover the amount of damages the jury had assessed, constituted misconduct. Numerous cases have held this character of overt act constituted jury misconduct. Trousdale vs. Texas & New Orleans Railroad Company 154 Tex 231; 276 S.W.2d 242. Thompson vs. Copeland (Tex. Civ. App.) 289 S.W.2d 312 (Ref. N.R.E.). Pryor vs. New St. Anthony Hotel Company (Tex. Civ. App.) 146 S.W.2d 428 (Writ Ref.). Kimble vs. Younger Brothers (Tex. Civ. App.) 283 S.W.2d 254 (Ref. N.R.E.). Barclay vs. Montgomery-Ward & Company (Tex. Civ. App.) 269 S.W.2d 445 (Ref. N.RE.). Heflin vs. Fort Worth & D. C. Ry. Co. (Tex. Civ. App.) 207 S.W.2d 114 (Ref. N.R.E.).

The foreman's statement relating to the materality of certain jury findings was made after the damage issues had been answered. The proximate cause issue referred to had not been answered after two lengthy discussions. The jury had "passed over" the issues because of their inability to agree, and had come to it again only after answering the other issues. The three jurors who testified all argreed the foreman made the statement at least two times and that the statement led them to agree to vote as they did on the negligence and proximate cause issues. We think these

acts of misconduct caused probable harm to the plaintiff. Although it is not in itself persuasive, a statement by Juror Simpson: "It was the desire of the jury . . . . I don't believe there was anyone who wanted to do otherwise . . . to award Mrs. Ferguson something", strengthens the conclusion the jurors were influenced in their vote by the statements of the foreman.

It is also uncontradicted the foreman informed the jury a person "is innocent until found guilty beyond a reasonable doubt", as stated by one juror; or "beyond a shadow of a doubt", as stated by another during a discussion of the negligence issues. As one juror stated in his affidavit: "Most of the jury voted the way they did because they didn't want to make a criminal of the defendant". The above erroneous statement, clearly contrary to the court's instructions, was an overt act of jury misconduct. Another juror told of her personal experience when she "mentioned that her brakes had failed before and she could understand how this could have happened to the boy". The accumulative effect of the acts of misconduct call for a reversal and require that the verdict be set aside. Parris vs. Jackson (Tex. Civ. App.) 338 S.W.2d 280. Gonzalez vs. Broussard (Tex. Civ. App.) 274 S.W.2d 737 (Ref. N.R.E.). Scoggins vs. Curtiss & Taylor 148 Tex 15; 219 S.W.2d 451.

The judgment o the trial court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

James G. Denton, Chief Justice

## APPENDIX C

No. B-1349

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In the
SUPREME COURT OF TEXAS

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JAMES WALTER FOUNTAIN
v.
FAYE S. FERGUSON

---

Austin, Texas, June 18, 1969.

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of No. B-1349,

JAMES WALTER FOUNTAIN ET AL VS. FAYE S. FERGUSON was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

SUPREME COURT, U. S.

FILED

OCT 10 1969

JOHN F. DAVIS, CLERK

No. 594

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

FAYE S. FERGUSON, *Petitioner*

*vs.*

JAMES WALTER FOUNTAIN, *Respondent*

## Brief of Respondent in Opposition to Petition for Certiorari

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No. 594

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

FAYE S. FERGUSON, *Petitioner*

*vs.*

JAMES WALTER FOUNTAIN, *Respondent*

## Brief of Respondent in Opposition to Petition for Certiorari

*TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:*

James Walter Fountain, Respondent, submits this Brief in reply and in opposition to Petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of Texas, and would respectfully show the following:

### OPINIONS OF THE COURTS BELOW

The Opinion of the Court of Civil Appeals at Amarillo is reported in 437 SW2d 323.

The Opinion of the Texas Supreme Court, reversing the judgment of the Amarillo Court of Civil Appeals and affirming the Trial Court's judgment, is reported in 441 SW2d 506.

## JURISDICTION

Petitioner alleges jurisdiction under *Title 28, U.S.C., Section 1257*, under the theory that there was a denial of due process and equal protection of laws under the Fifth and Fourteenth Amendments to the United States Constitution by the Texas Supreme Court's Opinion affirming the judgment of the Trial Court for Respondent (defendant in the Trial Court).

We respectfully submit that there is no basis for jurisdiction in this case. Aside from the fact that the Texas Supreme Court's decision is clearly correct on the merits, there is no federal or constitutional question involved. This is a common-law action for personal injuries arising out of a collision between two automobiles, which was brought by Petitioner against Respondent. The case was tried before a jury, and the Trial Court rendered judgment for Respondent upon the jury's findings to the special issues submitted, finding that Respondent was not guilty of any act of negligence which was a proximate cause of the collision. Petitioner filed a Motion to Set Aside the Jury Verdict and a Motion for New Trial, alleging, essentially, that there were three acts of jury misconduct. The Trial Court, after hearing all of the evidence presented, overruled the motions, thereby holding that there was no jury misconduct and that, in any event, there was no such prejudicial harm as required reversal of the jury verdict and judgment. The Court of Civil Appeals reversed the judgment of the Trial Court and remanded the case for new trial, but the Texas Supreme Court reversed the judgment of the Court of Civil Appeals and affirmed the judgment of

the Trial Court for Respondent. The first time that Petitioner ever contended there was any constitutional issue involved was in her Petition for Rehearing in the Texas Supreme Court.

Clearly, no constitutional right of Petitioner was violated and no constitutional issue is involved.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner alleges applicability of the Fifth and Fourteenth Amendments. The Fourteenth is the amendment applicable to states and the portion of Section 1 thereof relied upon by Petitioner provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law * * *."

Rule 327, Texas Rules of Civil Procedure (Vernon's Texas Rules Annotated, Vol. 3, p. 527) governing motions for new trial based upon jury misconduct, provides:

> "Where the ground of the motion is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury or that they received other testimony, or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the testimony received, of the communication made, or the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evi-

dence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party."

Rule 434, Texas Rules of Civil Procedure, governing the Courts of Civil Appeals (Vernon's Texas Rules Annotated, Vol. 5, p. 3), provides in part:

> "Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, * * *."

Likewise, Rule 503, Texas Rules of Civil Procedure, governing the Texas Supreme Court (Vernon's Texas Rules Annotated, Vol. 5, p. 580), provides in part:

> "Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that an error of law has been committed by the trial court in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the petitioner as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, * * *."

## QUESTIONS PRESENTED FOR REVIEW

There is no federal or constitutional issue involved or presented in this case.

It should also be noted here (as will be discussed in greater detail below) that the factual premises or basis stated by Petitioner in his Statement of Questions Presented (Petition for Certiorari, pp. 2 and 3) are inaccurate. Petitioner states that the questions presented are whether Petitioner has been denied due process and equal protection under the Fifth and Fourteenth Amendments of the United States Constitution by Rule 327 of the Texas Rules of Civil Procedure and the judgment of the Texas Supreme Court requiring Petitioner to bring up the Statement of Facts of the evidence presented in the case *when "undisputed jury misconduct" and "undisputed reversible error" is established and shown by the Transcript of the Statement of Facts on the Motion to Set Aside the Jury Verdict.*

Such statement is wholly incorrect. Petitioner contends that there were three separate acts or occurrences of jury misconduct. It is well settled by numerous decisions of the Texas Supreme Court and Courts of Appeals that two of the occurrences relied upon by Petitioner as misconduct do not constitute jury misconduct. As to the other occurrence relied upon, the evidence, even in the Statement of Facts on the Motion to Set Aside the Jury Verdict, is conflicting, and the Trial Court was clearly entitled to find that the alleged act of misconduct did not even occur.

Furthermore, it has been provided by the Texas

Rules of Civil Procedure and settled by numerous decisions of the State appellate courts for years that error occurring in the trial court does not require reversal of the verdict and judgment unless such error was reasonably calculated to be prejudicial and result in the rendition of an improper judgment and that the burden is upon the appealing party to establish prejudicial error. Obviously, in determining whether the jury was probably influenced by some improper statement or consideration in answering the special issues submitted to it, it would be not only material but essential to look at the evidence which was presented to the jury on the various issues in the trial, and prejudicial error was not established when the appellate court did not even have before it the evidence in the case which the Trial Court was required to consider in reaching its decision as to whether any jury misconduct was reasonably calculated to have caused an improper verdict.

Even in the testimony presented on the Motion to Set Aside the Jury Verdict, there was abundant evidence to support the Trial Court's finding that any misconduct was not prejudicial or calculated to cause the rendition of an improper judgment since each of the jurors specifically testified that the issues were answered upon the basis of the evidence presented in the case and not upon any agreement as to which party should win or any other improper consideration.

## STATEMENT OF THE CASE

This is an action for personal injuries allegedly sustained by plaintiff, Faye Ferguson, in an automobile collision between an automobile driven by her and another automobile driven by the defendant, James Walter Fountain. The case was tried before a jury in the 140th District Court of Lubbock County, Texas. In response to special issues submitted, the jury found:

(1) That defendant failed to keep a proper lookout, but that such failure was not a proximate cause of the collision.

(2) That defendant was not driving at an excessive rate of speed under the circumstances.

(3) That defendant failed to turn in time to avoid the collision but that such failure was not negligence.

(4) That defendant did not drive his vehicle too closely behind the vehicle of plaintiff.

(5) That defendant was confronted by a sudden emergency.

(6) That upon being confronted by such sudden emergency defendant did what an ordinary prudent person would have done under the same or similar circumstances.

(7) and (8) That the total damages sustained by plaintiff were $6,476.62.

Plaintiff filed a Motion to Set Aside the Jury Verdict and Motion for New Trial, based upon alleged jury misconduct. A hearing was had on such motion

by the Trial Court, at which plaintiff presented three witnesses. After the hearing, the Trial Court overruled Petitioner's motion.

In appealing from the Trial Court's judgment, plaintiff did not file the Statement of Facts or any record of the evidence adduced on the trial of the case. Plaintiff filed only the Transcript containing the material pleadings and the Statement of Facts of the testimony presented on the Motion to Set Aside the Jury Verdict.

In essence, plaintiff contended that there were three acts of jury misconduct.

Plaintiff's primary contention of jury misconduct was that the jury foreman, a Mr. Craig, told the other jurors, while they were deliberating on the answers to Special Issues 1 (A) and (B) (inquiring whether defendant failed to keep a proper lookout and such was a proximate cause of the collision), that plaintiff would receive the damages which they found regardless of the jury's answers to Special Issues 1 (A) and (B).

First, the testimony is not undisputed that the foreman made such a statement, and the testimony of the juror, Mr. Kutch, who testified that such statement was made, is contradictory and conflicting with respect to exactly what was said and what was meant by Mr. Craig in the discussion relating to Special Issues 1 (A) and 1 (B), and there was clearly a fact issue presented for the Trial Court on the basis of Mr. Kutch's conflicting testimony as to whether the jury foreman, Mr. Craig, made any improper state-

ment (i.e., whether there was any jury misconduct). In this connection, the Court's Charge instructs the jury not to concern themselves with the effect of their answers (Tr 12, SF 38). It is undisputed that before the jury began deliberations Mr. Craig reread and reminded the jury of these instructions, specifically the provision that they should not consider the effect their answers would have on the judgment (SF 8-9, 28).

Mr. Kutch's affidavit was admitted into evidence (SF 4-5, Tr 26-27). In his affidavit, Mr. Kutch stated:

> "I made the statement, when we got back to issue No. 1, that it wouldn't make any difference how we decided issue No. 1 at this point, that if we didn't find negligence and liability on the part of the defendant there would be no damages awarded.
>
> "The foreman replied that this point was immaterial and irrelevent, that *those things* didn't make any difference." (Tr 26-27) (emphasis ours)

Thus, in his affidavit, Mr. Kutch, in essence, testified that he himself made a statement regarding the effect of the jury's answers to Special Issue 1 on the judgment which would be rendered and that Mr. Craig, the foreman, instructed them exactly as the trial court had instructed them in the Charge that the effect of their answers on the judgment were immaterial and irrelevant and they should not be concerned with the effect of their answers on the judgment.

During the hearing, Mr. Kutch attempted to change

his testimony with respect to what was said by Mr. Craig (SF 16-17). Of course, it is well settled that the trial court has the right to believe a portion of the testimony of a witness while disbelieving another part, and the Trial Judge was clearly entitled to believe that Mr. Kutch's first and written statement in his affidavit was more accurate and credible than his testimony at the hearing, wherein he attempted to change his testimony.

Another conflict appears in Mr. Kutch's testimony given on direct and cross examination.

On direct examination Mr. Kutch testified:

> "Well, we were finding no negligence on the part of the defendant and we had already awarded, or rather, we had finished—I believe it was the medical payments or—and I thought it was—why should we continue to waste time if we were going to find that the defendant—there was no negligence on the part of the defendant, at which time I was assured by the foreman of the jury that this made no difference as to what damages would be awarded, *if any*." (emphasis ours)

Thus, on direct examination, Mr. Kutch clearly testified that the foreman *did not* tell them that the plaintiff would be awarded damages regardless of their answer to Special Issue 1. Mr. Kutch also attempted to change this testimony on cross examination (SF 19-20), but, again, the trial court was clearly entitled to believe the testimony first given by Mr.

Kutch on direct examination and to disregard his subsequent conflicting testimony.

Furthermore, each of the jurors testifying on the motion specifically testified that all of the special issues were answered solely on the basis of the evidence presented in the case and that their answers were not influenced by jury misconduct or any other improper consideration.

"Q No, sir. What I'm asking you is, did you-all get together and agree that one side ought to win and try to figure out the way to answer the questions so you could accomplish that?

"A Well, if anybody did, I was not a party to it. I don't—

"Q All right, fine.

"A —there was—there was nothing ever stated about it.

"Q Well, there wasn't any agreement, then?

"A No.

"Q As I understand it, you had trouble from the very beginning, really, in your—

"A Question No. 1 and 2 were the two problems.

"Q Well, was there ever any real agreement that you would be bound by some idea before you would answer one of these questions in here or did you just thrash it out and then answer them?

"A I would have to say the latter, Mr. Addison, that we thrashed it out and then answered it." (S.F. 15-16)

"Q Now, No. 1 was—well, let me see if I remember what No. 1 was. It was on lookout and you answered it, 'Yes.'

"A That he was keeping a proper lookout.

"Q Well, no that he failed to keep a proper lookout?

"A That's right.

"Q All right.

"A But that that was not a proximate cause of the accident.

"Q Now, did you vote on the basis of—No. 2 there, you voted on the basis of the evidence?

"A Yes.

"Q As far as you know, did everybody else vote on the basis of the evidence as far as No. 1-A is concerned?

"MR. SALYARS: We object, Your Honor, that's calling for a conclusion in view of the facts that have already been stated.

"MR. ADDISON: I'm asking as far as he knows, Your Honor.

"THE COURT: Overruled.

"MR. SALYARS: Exception.

"Q As far as you know, did everybody else answer on the basis of the evidence?

"A Well, of course, I can't answer about—

"Q I know that you don't know what was in their mind but I'm just asking as far as you know?

"A As far as I know, that would be one hundred per cent correct. Like I say, I couldn't answer for them specifically." (SF 17-18)

"Q And there was one place in there where he read to you again, and you heard the Court read, 'Do not consider what effect your answers

will have on the judgment to be entered in the case,' or words to that effect?

"A Well, I'd have to have it read to me because I don't remember the exact terminology.

"Q Well, do you remember reading in there, 'Do not decide who you want to win and then answer the questions accordingly'?

"A Oh, yes, I realize that.

"Q All right. Do you mean that somebody wanted to let the woman win and tried to answer the questions that way?

"A No, sir. I think everyone had—on listening to the evidence that was presented I think everyone had pretty well made up their mind to varying degrees on this thing.

"Q You mean as to who ought to win or as to how to—

"A Well, we weren't worried—I wasn't worried about who should win or who should lose or anything like that, whatsoever. I was going by what I had heard in the Courtroom and what I felt was just within myself and I sweated a lot of blood over it myself. I did an awful lot of soul searching and thinking along the evidence and everything as to what I thought was just and not trying to answer the questions according to who should win or who should lose.

"Q In other words, as the jury took each question up individually, is that the way you went about voting on your answers to them, according to what you thought?

"A According to each answer, yes, sir.

"Q Yes, sir, that's what I'm talking about.

"A Uh-huh." (SF 28-29)

"Q Did you agree—did you-all get in there

> and make an agreement, 'Well, now, Mrs. Ferguson ought to win this lawsuit so let's answer these questions so that she will win the lawsuit'?
>
> "A No, sir." (SF 36)

Similarly, Mr. Traveland testified that the jury considered and voted on each issue individually according to what the evidence showed and not who would win or lose (SF 28-29, 31).

Likewise, Mr. Simpson testified that the issues were not answered in accordance with any agreement among the jurors as to which party should win (SF 36).

Thus, even if it were undisputed that the jury foreman made a statement to the effect that plaintiff would receive damages regardless of how the jury answered Special Issue No. 1 (which it was clearly not, as discussed above), there is abundant testimony that such statement in no way affected or influenced the jury's answers to Special Issues 1(A) and (B) and that such issues were answered solely on the basis of the evidence, and nothing else.

At the conclusion of the testimony on the motion, the Trial Court stated:

> "I don't think there is any jury misconduct here on the basis of the evidence." (SF 36)

## ARGUMENT AND AUTHORITIES

### (1) No Federal or Constitutional Question Involved.

Because of the obvious burden and expense to all parties involved in new trials, the Texas Rules of Civil Procedure, Rules 434 and 503, quoted above, enacted in 1941, and the rules even prior to that date, have provided that the judgment of the trial court shall not be reversed unless the error amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case.

Rule 327, governing motions for new trial based upon allegations of jury misconduct, specifically provides that the trial court shall grant a new trial only if the misconduct be material and it appears both from the evidence "*both on the hearing of the motion and the trial of the case and from the record as a whole*" that injury probably resulted to the complaining party.

It is well settled and consistent with fundamental basic procedure that the party alleging misconduct has the burden in the trial court (and on appeal should the trial court rule adversely to the movement) of establishing (1) that jury misconduct occurred, and (2) that the misconduct was of such prejudicial nature as to require setting aside the verdict and judgment. *Crawford vs. Detering Co.*, 237 SW2d 615 (1) (Tex.S.Ct., 1951); *Taylor vs. Dallas Transit Company*, 351 SW2d 554 (4) (Tex.Civ.App., 1961, error ref. n.r.e.); *Beynon vs. Cutberth*, 390 SW2d 352 (1) (Tex.Civ.App., 1965, no writ hist.); *Goates vs. In-*

*gram*, 386 SW2d 654 (4) (Tex.Civ.App., 1965, error ref. n.r.e.).

When the trial court overrules the motion for new trial alleging jury misconduct without filing specific findings of fact and conclusions of law, it is presumed the trial court found that there was no jury misconduct. *Brawley vs. Bowen*, 387 SW2d 383 (1) (Tex.S. Ct., 1965); *Anderson vs. Hooker*, 420 SW2d 235 (7) (Tex.Civ.App., 1967, error ref. n.r.e.); *Sims vs. McKnight*, 420 SW2d 173 (2) (Tex.Civ.App., 1967, error ref. n.r.e.). It is likewise presumed that the trial court found that any misconduct was not prejudicial and was not reasonably calculated to cause a rendition of an improper judgment. *Morrell vs. State*, 390 SW2d 374 (2) (Tex.Civ.App., 1965, no writ hist.); *Buie vs. Texas Employers' Insurance Association*, 383 SW2d 261 (4) (Tex.Civ.App., 1964, error ref. n.r.e.); *Stewart vs. Humble Oil & Refining Co.*, 193 SW2d 259 (1) (Tex.Civ.App., 1946, error ref. n.r.e.).

In this case, the Trial Court also stated at the conclusion of the testimony that on the basis of the evidence he did not feel that there was any misconduct (SF 36).

It is well settled that the question of whether jury misconduct occurred is a question of fact, and in determining this question the trial judge has the same latitude concerning the credibility and weight to be given the testimony as does the trier of fact in any case. *Phillips vs. Texas & Pacific Ry. Co.*, 223 SW2d 258 (1) (Tex.Civ.App., 1949, error ref. n.r.e.); *City of Dallas vs. Hutchins*, 226 SW2d 155 (6) (Tex.Civ. App., 1949 error ref. n.r.e.).

Since the question of whether misconduct occurred is a question of fact, the trial court's action setting aside the motion for new trial based upon jury misconduct will be affirmed where the evidence is conflicting and where there is any evidence in support of the trial court's finding. *Younger Brothers, Inc. vs. Myers*, 324 SW2d 546 (6) (Tex.S.Ct., 1959); *State vs. O'Dowd*, 312 SW2d 217 (5) (Tex.S.Ct., 1958); *Hoffman vs. French, Ltd.*, 394 SW2d 259 (16) (Tex. Civ.App., 1965, error ref. n.r.e.); *Hartford Accident & Indemnity Company vs. Gladney*, 335 SW2d 792 (6) (Tex.Civ.App., 1960, error ref. n.r.e.).

With respect to the initial question of whether misconduct occurred, there is abundant evidence, some of which is summarized in the Statement of the Case above, supporting the Trial Court's findings that there was no jury misconduct.

Even if it were undisputed that jury misconduct occurred, it is obvious that the evidence and testimony presented in the trial relating to the various issues in the case is highly relevant and material in determining whether the misconduct was probably prejudicial and was likely to have resulted in an improper verdict. In other words, if the overwhelming preponderance of the testimony supports the jury's answers to the special issues, then it would be much less likely that a particular act of jury misconduct influenced the jury's answer or answers to special issues whereas if the weight of the evidence appeared to be contrary to the jury's answers, then it would be much more likely that jury misconduct might have influenced the jury's answers to the special issues.

In determining whether there was any prejudicial harm, the trial court was required to consider, and it must be presumed that the trial court did consider, the evidence presented in the trial of the case on the various special issues under Rule 327. How could an appellate court possibly say that the Trial Court's decision (that there was no prejudicial misconduct) was erroneous when the appellate court does not even have before it the evidence and testimony upon which the Trial Court's decision was based. This is very clearly pointed out in the case of *Ford vs. Texas & Pacific Railway Company*, 370 SW2d 795 (Tex.Civ. App., 1963, no writ hist.), where the Court stated (p. 796):

> "*Since there is no statement of facts showing the evidence adduced at the trial of the case on the merits, we have no way to determine that the alleged jury misconduct and alleged prejudiced juror probably resulted in the rendition of an improper judgment.* See Davis vs. Damge, Tex. Civ.App., 328 S.W.2d 203, (Ref. N.R.E.); Chadwick v. Glens Falls Insurance Company, Tex.Civ. App., 340 S.W.2d 501. In the last cited case which is directly in point the court stated as follows:
>
> > "'The burden is on the plaintiff, who complains of the trial court's action, to show from the record as a whole that the errors complained of amount to such a denial of his rights as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment in the case.'" (emphasis ours)

Among numerous cases holding that the question of

prejudicial harm must be determined not only from the evidence on the motion but from the evidence taken during the trial are, *Motley vs. Mielsch*, 200 SW2d 622, 623 (Tex.S.Ct., 1947); *Willrodt vs. Union City Transfer*, 258 SW2d 443, 446 (Tex.Civ.App., 1953, error ref. n.r.e.); *Taylor vs. Dallas Transit Company*, 351 SW2d 554 (5) (Tex.Civ.App., 1961, error ref. n.r.e.); *Texas Employers' Insurance Association vs. Waldon*, 392 SW2d 509 (4) (Tex.Civ.App., 1965, error ref. n.r.e.); *Chadwick vs. Glens Falls Insurance Company*, 340 SW2d 501 (5) (Tex.Civ. App., 1960, no writ hist.); *Kendall vs. Southwestern Public Service Company*, 336 SW2d 770 (8) (Tex. Civ.App., 1960, no writ hist.).

In order for the State appellate court to reverse the judgment of the Trial Court as urged by Petitioner, the appellate court would have been compelled to make a decision "in the dark" without all of the material facts before it, and such a decision would be wholly arbitrary, speculative and without foundation.

Plaintiff did not even contend there was a federal or constitutional question until plaintiff filed its Petition for Rehearing in the Supreme Court of the State of Texas after the Supreme Court had affirmed the judgment of the Trial Court. The question was not even timely raised. In *St. Louis & San Francisco Railroad Company vs. Shepherd*, 240 U.S. 240, 60 L.Ed. 622, 624, this Court said:

> "The claim under the Carmack amendment was first set up and asserted in a petition for rehearing after the judgment in the trial court was affirmed by the supreme court of the state.

> The petition was not entertained, but was denied without passing upon the Federal question thus tardily raised. That question, therefore, is not open to consideration here. Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 41 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; McCorquodale v. Texas, 211 U. S. 432, 437, 53 L. ed. 269, 270, 29 Sup. Ct. Rep. 146; Forbes v. State Council, 216 U. S. 396, 399, 54 L. ed. 534, 535, 30 Sup. Ct. Rep. 295; Consolidated Turnp. Co. v. Norfolk & O. V. R. Co., 228 U. S. 326, 334, 57 L. ed. 857, 862, 33 Sup. Ct. Rep. 510."

The mere assertion that a federal or constitutional question exists does not vest the Supreme Court with jurisdiction where the contention is clearly without basis or foundation. *California Water Service Company vs. City of Redding*, 304 U.S. 352, 82 L.Ed. 1323 (1937); *Valley Steamship Company vs. Wattawa*, 244 U.S. 202, 61 L.Ed. 1084 (1916); *St. Louis & San Francisco Railroad Company vs. Shepherd*, 240 U.S. 240, 60 L.Ed. 622 (1915).

It is well settled that the Fourteenth Amendment does not require uniformity of state laws, substantive or procedural, and does not assure immunity from judicial error. *Beck vs. Washington*, 369 U.S. 541, 8 L.Ed.2d 98, 110 (1962), rehearing denied, 370 U.S. 965, 8 L.Ed.2d 834; *Milwaukee Electric Railway & Light Co. vs. State of Wisconsin*, 252 U.S. 100, 64 L.Ed. 476 (3) (1920); *Dohany vs. Rogers*, 281 U.S. 362, 74 L.Ed. 904 (1930); *Reetz vs. Michigan*, 188 U.S. 505, 47 L.Ed. 563 (1903); *16 Am.Jur.2d*, "Con-

*stitutional Law," Sections 533, 536; 16A C.J.S., "Constitutional Law," Sections 505b, 562.*

Matters of state practice and construction of state statutes are matters for state court determination. *Central Vermont Railway Company vs. White*, 238 U.S. 507, 59 L.Ed. 1433 (1914); *Speiser vs. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460 (14) (1958), rehearing denied, 358 U.S. 860, 3 L.Ed.2d 95; *Aero Mayflower Transit Company vs. Board of Railroad Commissioners*, 332 U.S. 495, 92 L.Ed. 99 (1) (1947).

Even in criminal cases, whether to grant an appeal, the terms upon which it will be granted and the procedure used to determine the record on appeal are purely matters of state law and in nowise involve the denial of due process. *Andrews vs. Swartz*, 156 U.S. 272, 39 L.Ed. 422 (1894); *Chessman vs. People*, 205 F.2d 128, 131 (6-8) (9th Cir., 1953), certiorari denied, 346 U.S. 916, 98 L.Ed. 412, rehearing denied, 347 U.S. 907, 98 L.Ed. 1066.

**(2) No Prejudicial Jury Misconduct Shown Even Under the Record Presented to the Appellate Courts.**

As discussed under the Statement of the Case above, the testimony presented on the Motion to Set Aside the Jury Verdict was conflicting with respect to the allegation of misconduct concerning the alleged statement by the jury foreman that plaintiff would receive damages awarded regardless of how the jury answered Special Issues 1 (A and B). There was abundant evidence to support a finding by the Trial Court that no such statement was even made and that

what the foreman said was, in effect, merely to remind the jury of the Trial Court's instruction that they should not consider what effect that their answers to the special issues would have on the judgment to be rendered by the court.

There is another reason why such statement, even if made, did not constitute prejudicial error. It appears to be undisputed that the jury answered all of the other issues before returning to Special Issue No. 1 (A and B) and that whatever statement was made by the jury foreman, Mr. Craig, was made after the jury had answered the other issues, including Issues 5 and 6 (finding that on the occasion in question defendant was confronted by a sudden emergency and that upon being confronted by such emergency defendant did what an ordinary prudent person would have done under the same or similar circumstances) (SF 14; Tr 19).

Such findings of sudden emergency relieves the defendant of liability in connection with acts which would otherwise constitute negligence and proximate cause. *Goolsbee vs. Texas & N. O. R. Co.*, 243 SW2d 386 (1) (Tex.S.Ct., 1951); *Dallas Ry. & Terminal Co. vs. Young*, 155 SW2d 414 (1) (Tex.Civ.App., 1941, error ref.); *Higginbotham vs. Ritchie*, 367 SW2d 210 (2) (Tex.Civ.App., 1963, no writ hist.); *Texas & Pacific Railway Company vs. Hoyle*, 421 SW2d 442, 447 (Tex.Civ.App., 1967, error ref. n.r.e.).

Thus, even if the jury had answered both issues, 1 (A) and (B), favorably to plaintiff, judgment would still have been rendered for defendant because of the

jury findings to Special Issues 5 and 6, and Special Issues 1 (A) and (B) and the alleged misconduct with regard to such issues is immaterial. E.g., *Cloud vs. Zellers*, 158 Tex. 253, 309 SW2d 806, 809 (2) (1958); *Hartman vs. Harder*, 322 SW2d 555, 560 (Tex.Civ. App., 1959, no writ hist.); *Morriss vs. Centex Paving Company*, 348 SW2d 790, 794 (Tex.Civ.App., 1961, error ref. n.r.e.).

The other two statements by jurors relied upon by Petitioner do not constitute jury misconduct under numerous decisions of the appellate courts of the State of Texas.

Petitioner relies upon testimony that during the deliberations the jury foreman, Mr. Craig, stated that in his opinion a man was innocent until proven guilty beyond a reasonable doubt.

In *Compton vs. Henrie*, 364 SW2d 179 (Tex.S.Ct., 1963), which was also an action for damages for injuries arising out of a motor vehicle collision, the evidence showed that one of the jurors, named Fugate, told the other jurors that the defendant should be found innocent until proved guilty beyond a reasonable doubt and that the defendant should be given the benefit of a reasonable doubt. The Texas Supreme Court held:

> "We conclude that Fugate's statements amounted to nothing more than a misinterpretation of the court's charge; and were, consequently, not misconduct." 364 SW2d 184.

The Court reached the same conclusion in a very

similar fact situation in *Whited vs. Powell*, 285 SW2d 364 (Tex.S.Ct., 1956).

And in *Upper Valley Aviation, Inc. vs. Fryer*, 392 SW2d 737, 742-743 (Tex.Civ.App., 1965, error ref. n.r.e.), the Court of Appeals held that the juror's statements that the defendant must be guilty of undue and excessive negligence which had to be proved beyond a reasonable doubt amounted to nothing more than a misinterpretation of the court's charge and was not jury misconduct.

Here, the evidence clearly supports the Trial Court's implied finding that this was simply a misinterpretation of the Court's Charge and was not jury misconduct. The first thing that the foreman did when the jury retired was to read the Court's Charge to the Jury and remind them to follow the instructions given by the Trial Court. Mr. Craig did not purport to state that this was the law but simply that it was his opinion (SF 12-13).

Likewise, the statement by the woman juror (SF 8) relied on by Petitioner that her brakes had failed before and she could understand how this could happen to the boy (i.e., the defendant) was certainly not misconduct. It was merely a discussion of the testimony of the defendant and the stated opinion of the lady juror to the effect that she believed the defendant's testimony and did not feel the collision was caused by defendant's negligence. The whole function of the jury is to discuss the evidence under issues submitted to determine what evidence they believe and how the issues should be answered under the evidence presented.

Even if it be assumed that such statement by the lady juror constituted misconduct, it is well settled that for the misconduct to be material it must be shown that the jury's answers were influenced or affected by such misconduct. *Mrs. Baird's Bread Company vs. Hearn*, 300 SW2d 646 (1) (Tex.S.Ct., 1957); *Martin vs. Shell Oil Co.*, 262 SW2d 564 (1) (Tex.Civ.App., 1953, no writ hist.). There is no testimony here that the jury was in any way influenced by its answers to any of the issues by this remark.

With respect to all allegations by Petitioner of prejudicial jury misconduct, it should be noted, as set forth above, that each of the jurors testifying on the motion specifically testified that the issues in this case were answered on the basis of the evidence presented in the case and not on the basis of any improper agreement or consideration and there is abundant evidence, even in the Statement of Facts presented by Petitioner, which support the Trial Court's finding that there was no prejudicial error which required the Trial Court to set aside the verdict and judgment.

## CONCLUSION

We respectfully submit that there is not any constitutional issue involved and that the decision of the Texas Supreme Court upholding the judgment of the Trial Court in this case was clearly correct.

WHEREFORE, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A copy of the above and foregoing Brief of Respondent in Opposition to Petition for Certiorari was deposited in the United States Mail at Lubbock, Texas, in a properly stamped envelope addressed to Petitioner's counsel, Mr. A. W. Salyars, 426-9 Lubbock National Building, Lubbock, Texas 79401, with first class postage prepaid, on this the ___ day of October, 1969.

BUCK W. McNEIL
CRENSHAW, DUPREE & MILAM

By_____

*Attorneys for Respondent*